MOTION FILED

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No. 99-944

In The

Supreme Court of the United States

The Honorable HELEN CHENOWETH, the Honorable BOB SCHAFFER, the Honorable DON YOUNG, and the Honorable RICHARD W. POMBO, all in their official capacities,

Petitioners,

v.

WILLIAM J. CLINTON, President of the United States, GEORGE T. FRAMPTON, JR., Acting Chair of the Council on Environmental Quality, individually and in their official capacities, and the UNITED STATES OF AMERICA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

LANDMARK LEGAL FOUNDATION'S MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION

RICHARD P. HUTCHISON*
MARK R. LEVIN
Landmark Legal Foundation
3100 Broadway
Suite 515
Kansas City, Missouri 64111
(816) 931-1175

**Counsel of Record*

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LANDMARK LEGAL FOUNDATION'S MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION

Landmark Legal Foundation respectfully moves this Court for leave to file the following brief amicus curiae in support of Petitioners in this matter. A letter attesting to their consent has been submitted to the Court.

Founded in 1976, Landmark Legal Foundation is a public interest law firm committed to preserving the principles of limited government, separation of powers, free enterprise, federalism, strict construction of the Constitution and individual rights. Landmark has offices in Kansas City, Missouri and Herndon, Virginia and has appeared before this Court on behalf of principle parties and as amicus curiae.

Because this case involves Constitutional issues of particular concern to Landmark's mission and expertise, it seeks the Court's permission to advise the Court more fully of the urgency for granting the Petition for Writ of Certiorari.

Respectfully submitted,

RICHARD P. HUTCHISON*
MARK R. LEVIN
Landmark Legal Foundation
3100 Broadway, Suite 515
Kansas City, Missouri 64111
816-931-5559
**Counsel of Record*

INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Landmark Legal Foundation is a national public interest law firm committed to preserving the principles of limited government, separation of powers, free enterprise, federalism, strict construction of the Constitution and individual rights. Landmark was established in 1976 and has offices in Kansas City, Missouri and Herndon, Virginia. The case before the Court presents the important separation of powers question of whether members of the legislative branch have standing to challenge the usurpation by the President of powers assigned by the Constitution to the legislative branch.

ARGUMENT

The District of Columbia Circuit Court of Appeals' decision in *Chenoweth, et al. v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999) misapplies this Court's decision in *Raines v. Byrd*, 521 U.S. 811 (1997) and should be overturned. This case is particularly important given the growing trend toward "government by executive order," which has reached near epidemic proportion in recent years.

With his creation via Executive Order 13061 of the American Heritage Rivers Initiative ("AHRI"), the President of the United States appropriated for himself the authority specifically reserved to the Congress under the Commerce Clause, the Property Clause and the Spending Clauses of the U.S. Constitution, and the Tenth Amendment to the Constitution. In addition, the President's

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae* or its counsel made a monetary contribution to the preparation and submission of this brief.

executive order violated the Federal Land Management and Policy Act.

In response, Petitioners brought a lawsuit in U.S. District Court seeking to enjoin the President's improper implementation of the AHRI, alleging that the President's action deprived Petitioners, who are Members of Congress, of their Constitutionally ordained responsibilities to debate and vote on legislation and to conduct oversight within the jurisdiction of their committee and subcommittees; to regulate commerce; to manage and regulate federal lands; and to authorize and appropriate federal expenditures. In short, with the stroke of his pen, the President has assumed for himself distinctly legislative functions in violation of the Constitution and the Separation of Powers doctrine.

The District Court dismissed Petitioners' complaint holding that they lacked standing. The District of Columbia Circuit Court of Appeals affirmed the District Court's decision, relying on this Court's decision in *Raines v. Byrd*, 521 U.S. 811 (1997). *Chenoweth*, 181 F.3d at 113. In its decision, the D.C. Circuit misapplied the facts in this case to this Court's holding in *Raines*, concluding that Petitioners' "claim to standing on the ground that the President's implementation of the AHRI without congressional consent injured them by diluting their authority as Members of Congress is indistinguishable from the claim to standing the Supreme Court rejected in *Raines*." *Id.* at 117. But the Circuit Court's analysis misses the mark.

Through the improper use of a Presidential executive order, the President has bypassed altogether the legislative process. This usurpation of the Congress' Constitutionally vested duties and authority dangerously upsets the balance of power among the three branches. More than the mere political squabble presented in *Raines*, Petitioners seek the Court's review of conduct that renders

moot the legislature's authority to enact legislation and moves the nation closer to "the risk of tyranny" warned of in *Printz v. U.S.*, 117 S.Ct. 2365, 2378 (1997). Accordingly, the Court should review and reverse the District of Columbia Court of Appeals' decision below.

MEMBERS OF CONGRESS HAVE STANDING TO DEFEND IN THE COURTS THEIR CONSTITUTIONALLY CONFERRED DUTIES AND AUTHORITY FROM USURPATION FROM THE EXECUTIVE BRANCH WHERE, AS HERE, THERE EXISTS NO POLITICAL ALTERNATIVE.

The legislative standing question presented in this case merits the Court's review as it involves a situation fundamentally distinguishable from that rejected by the Court in *Raines*. There the Court held that the petitioners did not have a personal stake in the dispute, but rather had suffered a political defeat insufficient to satisfy Article III requirements. *Raines*, 521 U.S. 811 (1997). Indeed, in *Raines* the petitioners, who included Members of the House and Senate, had debated vigorously in opposition to the "Line Item Veto" legislation, were out-voted by their opposition, and were unable to convince the President to veto the legislation, which became law upon the President's signature. In response, the *Raines* petitioners initiated a challenge in federal court.

In holding that the *Raines* petitioners lacked standing to bring their action, this Court focused on the nature of the claim asserted. Its conclusion was that the offended members, who claimed to suffer a diminution of institutional power, asserted an injury that ran with "the Member's seat, a seat which the Member holds . . . as trustee for his constituents, not as a prerogative of personal power." *Id.* Contrasting the *Raines* petitioners from state legislators granted standing in *Coleman v. Miller*, 307 U.S.

433 (1939), this Court emphasized that the Members in *Raines* did "not allege that they voted for a specific bill, that there were sufficient votes to pass the bill, and that the bill was nonetheless deemed defeated. *In the vote on the Line Item Veto Act, their votes were given full effect. They simply lost that vote.*" *Raines*, 521 U.S. at ___ (emphasis added).

The President's action in this case goes too far. Here, Petitioners were denied any opportunity to review or debate, let alone vote for or against, a specific bill to create the ARHI. The President's establishment by decree of the ARHI is nothing short of an insidious highjacking of legislative authority. The instant case is clearly more analogous to the controversy this Court reviewed in *Coleman*.

In *Coleman* twenty Kansas state senators voted to reject an amendment to the federal Constitution. 307 U.S. 436. As twenty other senators voted to adopt the amendment, the state's lieutenant governor intervened to break the tie, voting for the amendment's adoption. *Id.* at 438. The losing senators sought a writ of mandamus from the Kansas Supreme Court that would compel the appropriate state officials to recognize that the legislature had not in fact ratified the amendment. *Id.* This Court affirmed the Kansas Supreme Court's holding that the members had standing to bring their mandamus action. *Id.*

"It is obvious, then, that our holding in *Coleman* stands . . . for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified." *Raines*, 521 U.S. at ___. In this case, the President's executive order effectuated legislative action for the purpose of, and which had the effect of, usurping the legislative

process entirely. Consequently, there was no speech, there was no debate, and there was no vote. This conduct amounts to legislative nullification and should be reviewed – and rejected – by this Court.

The *Raines* Court concluded its standing analysis declaring that "[t]here is a vast difference between the level of vote nullification at issue in *Coleman* and the abstract dilution of institutional legislative power that is alleged here." *Id.* The same conclusion cannot be drawn in Petitioners' case. The usurpation of legislative power here extends well beyond abstract dilution. Petitioners have demonstrated a "plain, direct, and adequate interest in maintaining the effectiveness" of not only their votes, but the process through which they arrive at their voting decisions, i.e., the legislative process.

The harm suffered here certainly constitutes an institutional harm. But it is also a specific personal harm to the individual representatives entrusted by the voters to act as Senators and Members of the House of Representatives. As opposed to the Line Item Veto case, there is no meaningful political remedy available to these petitioners. This Court should grant the Petition for Writ of Certiorari and review the important separation of powers question presented in this case.

Respectfully submitted,

RICHARD P. HUTCHISON*
MARK R. LEVIN
Landmark Legal Foundation
3100 Broadway
Suite 515
Kansas City, Missouri 64111
(816) 931-1175

Counsel of Record